

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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RICKY SMITH,

Petitioner,

v.

9:03-CV-1265  
(TJM)(DRH)

SUPERINTENDENT GIAMBRUNO,

Respondent.  
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APPEARANCES:

OF COUNSEL:

RICKY SMITH  
Petitioner, *pro se*  
94-B-2501

HON. ELIOT SPITZER  
Attorney General of the State of New York  
Attorney for Respondent  
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Suite 102  
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PATRICK R. MACRAE, Esq.  
Assistant Attorney General

THOMAS J. MCAVOY, SENIOR U.S. DISTRICT JUDGE

**ORDER**

Ricky Smith ("Smith" or "petitioner") filed a petition for a writ of habeas corpus with the Court which was recommended denied and dismissed by the Report-Recommendation of Magistrate Judge David R. Homer. Docket No. 19. That Report-Recommendation was approved, and the petition dismissed, by Decision and Order of this Court filed March 30, 2006. Docket No. 23. Smith has appealed that dismissal to the Second Circuit and now seeks a Certificate of Appealability ("COA"). Docket No. 29.

28 U.S.C. § 2253(c)(1) provides in relevant part that:

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

- (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
- (B) the final order in a proceeding under section 2255.<sup>1</sup>

A COA may only be issued "if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(2).

After reviewing the relevant portions of the file in this action, and for the reasons set forth in the Court's Decision and Order and Magistrate Judge Homer's Report-Recommendation, the Court finds that Smith has failed to make such a showing herein. Therefore, the Court denies his request.

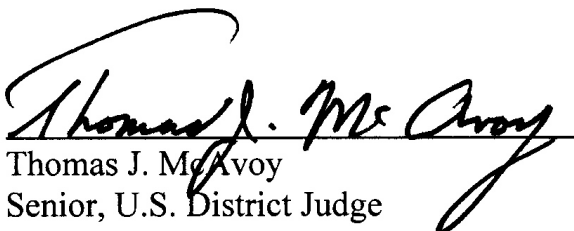
WHEREFORE, it is hereby

ORDERED, that petitioner's application for a Certificate of Appealability (Docket No. 29) is denied, and it is further

ORDERED, that the Clerk of the Court serve a copy of this Order upon the parties.

IT IS SO ORDERED.

Dated: May17,2006

  
Thomas J. McAvoy  
Senior, U.S. District Judge

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<sup>1</sup> Rule 22 of the Federal Rules of Appellate Procedure also provides that an appeal may not proceed "unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." See Fed.R.App.P. 22(b).